DATE: April 30, 1999

CASE NO: 1998-INA-212

In the Matter of

PROFESSIONAL TAX CONSULTANTS, INC.
Employer

on behalf of

RAZINA RAHMATULLAH
Alien

Appearances: Michael D. Ullman, Esq., Attorney for Employer and Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Professional Tax Consultants, Inc.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On May 8, 1996, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Razina Rahmatullah. (AF 74-75). The job opportunity was listed as "Accountant". (AF 74). The job duties were described as follows:

> Will be in touch with clients to discuss their financial matters and reporting requirements depending on the size of the company. Will prepare financial statements and profit and loss statements, fixed asset management, depreciation schedules, liability management, and notes and accounts payable, cash flow, inventory management and costing methods. Will prepare income tax filings and consulting for individuals, corporations and partnerships. Will review all compilations for financial statements. Will provide services related to taxes and accounting information. Will perform bank reconciliations, accounts payable and receivable[] and aging of accounts. Use of IBM compatible computer systems with audit software such as LOTUS 123, Microsoft Works, Insta Pay, Excel, Professional Quickbooks and spreadsheets.

(Id). The stated job requirements for the position, as set forth on the application, are a Bachelor's Degree in Business Accounting or a related business field, and 2 years experience in the job offered or 2 years experience in the related occupation of "computerized accounting with use of Lotus 123, Microsoft Works; [sic]".

On May 13, 1996, the Employer requested a waiver of any further recruitment effort due the fact that the Employer had placed an advertisement for the position and posted for the job opportunity at the business establishment and had not received any responses. (AF 80). On October 22, 1996, the file was forwarded to the CO. (AF 100). On December 30, 1996, the CO remanded the case back to the EDD denying the waiver request pursuant to 20 C.F.R. 656.21(i). The CO found that the alternative requirement for two years' experience in computerized accounting with the use of Lotus 123 and Microsoft Works to be unduly restrictive. (AF 97-99). On February 26, 1997, the EDD sent the Employer a Remand Notice informing it of the CO's findings that "[i]t appears that an accountant with experience in computerized accounting could begin working with the employer's programs or applications within a reasonable period of orientation." (AF 73). The Employer was required to provide information substantiating any time frame required to instruct an accountant in

the use of Lotus 123 and Microsoft Works submitted from the manufacturer or seller of that program or application. (Id.). The Employer responded to the Remand Notice on April 1, 1997, submitting general information on the use of the software programs (AF 39-69) and the file was again forwarded to the CO.

The CO issued a Notice of Findings ("NOF") on November 12, 1997, proposing to deny certification on the grounds that requirement of two years' experience in a job requiring the use of Lotus 123 and Microsoft Works was unduly restrictive. (AF 35-38). The CO found that the Employer's response to the Remand Notice failed to document the business necessity of the unduly restrictive requirement because "it appears that a U.S. accountant with any computerized accounting experience should be able to use the employer's software after a brief orientation." (AF 36). The CO explained that:

> Where the Employer requires two years experience with Microsoft [W]orks and Lotus 123 by brand name, U.S. accountants who have used other software packages are unnecessarily excluded. However, it appears that the normal requirements for the job would be related to the key accounting experience, not the brand or version of computerized accounting software previously utilized.

It appears that an accountant who has worked with similar programs or applications and who has broad experience would be able to work with the employer's software within a reasonable period of orientation.

(Id). The Employer was instructed to either delete the restrictive requirements and indicate a willingness to retest the labor market or justify the requirement based on business necessity. In order to demonstrate business necessity, the Employer was instructed to provide information from the manufacturer or seller of Lotus 123 and Microsoft Works specifically showing the length of time required for an accountant who has not utilized each specific application or program to begin working with it where the worker has experience using similar or related software. (AF 37). In addition, the Employer was instructed to provide documentation showing that these are the Employer's normal requirements. (Id.).

On September 19, 1997, the Employer submitted its rebuttal which consisted of a letter from Employer and a letter from Employer's counsel. (AF 20-34). The Employer argued that there was a misunderstanding by the Department of Labor as to its minimum requirements for this job and that the requirements are normal and usual for this occupation. The Employer asserted that "[w]e are **NOT** asking for two years of experience in the use of these programs with the usage of Lotus 123 and Microsoft Works but are only requesting that the applicant have a background and/or a demonstrated ability to use these programs in daily usage." (AF 31) (emphasis in original). The Employer also argued that the "Related Occupation" requirement is not a restrictive and narrowing requirement but is an expansive requirement because "we clearly mentioned two years of experience in the 'Job Offered' **OR** two years of experience in 'Related Occupation' **AND NOT** two years of experience in 'Job Offered' **AND** two years of experience in 'Related Occupation.'" (AF 32)

(emphasis in original). The Employer agreed with the finding that an applicant with experience in similar software programs may be able to perform all the duties of the job after only a short orientation period and the Employer asserted that such an applicant would have been considered for the job position. (AF 33). Nevertheless, the Employer refused to delete the requirement of two years experience in computerized accounting with the use of Lotus 123 and Microsoft Works. (AF 34). In addition, counsel for the Employer argued that the use of computers is considered normal for the occupation. (AF 22).

On November 25, 1997, the CO issued a Final Determination ("FD") denying certification finding that the Employer had failed to justify or delete the requirements cited in the NOF as restrictive. (AF 17-19). The CO noted that the NOF did not find that the requirement of two years in computerized accounting to be restrictive, only that two years experience in the job using Lotus 123 and Microsoft Works was restrictive. The CO found that the Employer failed to provide any information to suggest that a specific amount of time would be required for an accountant who used another spreadsheet or word processing program to begin using Lotus 123 and Microsoft Works. (AF 19). The CO noted that Employer's rebuttal stated it did not require two years experience using the specific software, however, the CO found that the Employer's advertisement clearly required that these two software programs were used during the two years experience. The CO concluded that:

> In refusing to delete the requirement for experience with Microsoft Works and Lotus 123, the Employer incorrectly mischaracterizes the Notice of Findings as having found computerized accounting experience restrictive. However, the body of the rebuttal both includes agreement with the finding that similar computerized accounting skills are transferable, and the Employer has missed the point that he was requested to either justify or delete specific requirements for [M]icrosoft [W]orks and [L]otus 123, whereas "computerized accounting" was never found restrictive.

(Id.).

On December 24, 1997, the Employer filed a Request for Review of Denial of Application for Labor Certification/Motion to Reconsider Denial of Labor Certification. (AF 2-15). The CO denied the Motion for Reconsideration on April 1, 1998, and on June 4, 1998, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("Board"). On June 30, 1998, the Employer advised the Board that it wishes to continue with this application for labor certification.

Discussion

The issue presented by this appeal is whether the alternative requirement of two years of experience in computerized accounting with the use of Lotus 123 and Microsoft Works is unduly restrictive under 20 C.F.R. § 656.21(b)(2).

The Board has considered the use of alternative requirements in the matters of *Francis Kellogg, et als.*, 94-INA-465, 94-INA-544, 95-INA-68 (Feb. 2, 1998) (*en banc*). In *Kellogg*, the Board held that: Any job requirements, including alternative requirements, listed by an employer on

the ETA Form 750A must be read together as the Employer's stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States. The job requirements shall be those defined for the job in the Dictionary of Occupational Titles ("DOT") and shall not include requirements for a language other than English. 20 C.F.R. § 656.21(b)(2). There are, however, legitimate alternative job requirements, which can, and should be permitted in the labor certification process. These alternatives must be substantially equivalent to each other with respect to whether the applicant can perform in a reasonable manner the duties of the job being offered. Thus, where an employer's primary requirement is considered normal for the job in the United States and the alternative requirement is found to be substantially equivalent to that primary requirement (with respect to whether the applicant can perform in a reasonable manner the duties of the job offered), the alternative requirement must also be considered normal for a § 656.21(b)(2) analysis.

The Board also held in *Kellogg* that where an alien does not meet the primary job requirements, but only potentially qualified for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. *See Kellogg*, supra.

In this case, the CO has not raised the issue of whether the Alien only potentially qualifies for the job because the Employer has listed an alternative requirement, and it appears from the Alien's statement of qualifications that she has met the primary requirement of 2 years experience in the job offered. (AF 91-92). Here, the CO denied the application because she found that the alternative requirement of 2 years experience in computerized accounting with use of Lotus 123 and Microsoft Works is not normally required for the job in the United States and thus was an unduly restrictive requirement.

Section 656.21(b)(2) of the labor certification regulations proscribes an employer's use of unduly restrictive job requirements in the requirement process. The employer bears the burden of documenting either that the job requirements for the position are those normally required for that position in the United States, or that those job requirements arise from business necessity. Here, the Employer has specified job requirements for an accountant position of 2 years experience in computerized accounting with use of Lotus 123 and Microsoft Works. Although experience in computerized accounting may be normal for accountants, experience in these two specific programs appears to exceed the DOT standard for the position. We conclude that the CO has correctly challenged this requirement and the Employer's responses to the CO do not document that these requirements are normal requirements or that they are required in this instance by business necessity .

A mere statement by an employer that particular job requirements are normal for the position is not sufficient documentation of that factor. *Tri-P's Corp.*, 87-INA-686 (Feb 17, 1989) (*en banc*). The Employer did not submit documentation, as requested by the CO, of its own in-house job descriptions with specifications, or show the number of accountants employed by the firm and its software requirements. Accordingly, it is clear that an Employer's listing of experience in these

specific software programs results in unduly restrictive job requirements, unless the Employer can show that they are required by business necessity.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business, and that the requirement is essential to preforming, in a reasonable manner, the job duties as described by the employer. Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 90-INA-387 (July 30, 1991). Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige, & Associates, Inc.*, 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Meditation Center*, 90-INA-395 (June 30, 1992).

In the NOF, the CO pointed out that an applicant with experience with similar software programs could learn how to use the two programs mentioned by the Employer after only a short period of orientation. The CO instructed the Employer to provide verifiable documentation from the manufacturer or seller specifically showing the expected length of orientation time that should be required for an accountant who has used other similar software to begin working with Microsoft Works or Lotus 123. The Employer responded in its rebuttal that "it is difficult to tell the average amount of time to train one in the usage of both [Microsoft Works and Lotus 123]. These are totally depending upon [sic] the prior background and training of each person in the computer field." In fact the Employer agreed with the CO's statement that only a short orientation may be needed for someone who has no experience with these specific programs and asserted that had an applicant with experience in programs other than Lotus 123 and Microsoft Works applied, they would have been considered. The fact that no U.S. applicants applied for this position, however, indicates that the Employer's requirements may have discouraged any applicants without the experience in the named software programs from even applying. The Employer's argument that the alternate requirement was expansive rather than restrictive is incorrect due to the chilling effect it may have had on U.S. workers. *See Eagle Travel & Cargo, Inc.*, 97-INA-259 (Aug. 19, 1998); *Francis Kellogg*, supra.

Accordingly, the CO was correct in finding that the Employer has failed to demonstrate that the described experience requirements arises from business necessity.

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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DONALD B. JARVIS

Administrative Law Judge

San Francisco, California